IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 767 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

RASIKLAL K SHAH

Appearance:

Mr.K.G. Shetha, AGP, for appellant

MR KG SUKHWANI for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 28/04/2000

ORAL JUDGEMENT

1. Appellant-original defendant No.1, by filing this appeal under Section 9 of the Ahmedabad city Civil Court Act, 1961, has challenged judgment and decree dated October 25, 1978, passed by the learned Judge, Court No.13, City Civil Court, Ahmedabad, in Civil Suit No.672

of 1972, by which judgment and decree, the suit was decreed for a sum of Rs.45,502.40 ps with interest at the rate of 6% per annum from the date of the suit till realisation, whereas the counter claim filed by the appellant was allowed to the extent of Rs.5205.30 ps.

2. The respondent entered into an agreement with the appellant for carting work of lifting 3000 MT of steel bars from Randheja Railway Station to Pethapur P.W Stores. The time allowed for the work was within 12 moths from the date of the written order i..e to commence from March 31, 1967. According to the respondent, as per the tender agreement, item No.1, they were supposed to lift steel bars of 3000 MT of 6 mm x 32 mm and rate of carting charge was fixed at Rs.10 per MT. According to the respondent, there were other items, like steel coils, which they lifted, which did not include in the suit agreement. As per the case of the respondent, they lifted 5000 MT of steel bars and coils. As per the case of the respondent, in the tender agreement, there was no item of carting of iron coils, but, on the assurance of the appellant that the respondent would be paid extra rate for carting of iron coils, the work of carting of iron coils was done by the respondent, According to the respondent, he had unloaded 2342 MT of iron coils and, therefore, he was entitled to amount of Rs.46,840/towards the said work, which was not included in the suit contract. It is claimed that the respondent received a letter dated March 31, 1970 from the Executive Engineer, Capital Project, Division No.IV, Gandhinagar, demanding amount of Rs.33,356/- from the respondent which was illegal and the appellant had no right to demand the same as iron coils were not tender items. It was stated that the respondent has lifted iron coils on assurance of the appellant that he would be paid extra rate of Rs.20 per MT for lifting of iron coil. It was contended that the appellant had wrongly debited amount of wharfage and demurrage to the account of the respondent which was illegal and the appellant had no authority to pay any alleged wharfage and demurrage on behalf of the respondent without his consent and knowledge and therefore the appellant had no right to demand the same. It was further contended by the respondent that letter dated February 4, 1970, was received from the the Executive Engineer, Capital Project, Division No.IV, Gandhinagar, informing that he had sent bills of the respondent for iron coils for approval of the Engineer, but, in spite of the said letter, the respondent did not receive extra payment for carting of iron coil. The respondent, thereafter, served statutory notice under Section 80 of the Code of Civil Procedure on April 20,

1970, calling upon the appellant to make necessary payment of the suit amount which was replied to by the appellant by their letter dated June 19, 1970. It is stated by the respondent that, having admitted the claim of extra item of lifting iron coil, the appellant made wrongful deduction and did not pay the said bill and, therefore, the respondent was constrained to file suit to recover Rs.60,075.70 ps with 12% running interest from the date of the suit till realisation.

3. The suit was contested by the appellant by filing written statement Exh.50, inter alia, contending that the suit was not maintainable and the defendant No.2 was wrongly impleaded in the suit and, hence, the suit be dismissed against defendant No.2, as being not maintainable. It was admitted that the respondent had filled in tender to lift iron bar from Randheja Railway Station under agreement dated march 31, 1967 and the respondent had started work of lifting iron bar from April 1, 1967. The contractor was paid 6th running bill which he accepted without any objection. It was further averred that the respondent-contractor had carried out carting of goods as per the suit contract without raising any objection upto January 25, 1968. It was stated that payment of 7th running bill was accepted by the respondent without any objection. It was further averred that, in the 7th running bill, quantity of 9731.910 MT of steel had to be stocked departmentally, but the contractor had failed to do so as per the terms and conditions. It was claimed that, during the period of January 25, 1968 to March 31, 1968, a huge quantity of steel coils of 10 mm dia. was received at Gandhidham Railway Station, but delivery of those goods was not taken by the respondent, as a result of which, the appellant had to pay heavy demurrage and wharfage charges. On behalf of the respondent, it was averred that notice was served upon the Deputy Engineer, Capital Project, for carting, storing, and stacking of steel goods. At the request of the respondent, arrangement for trailers was made and the Contractor was informed accordingly by the Executive Engineer under his letters dated March 19, 1968 and August 14, 1968. In the said letters, the respondent was informed that it had agreed as per its letter dated March 18, 1968 that the contract period was upto March 31, 1968 and as such the contractor was wholly responsible for carting work upto March 31, 1968. It was further averred that the respondent was responsible for unloading wagons and lifting coils and loading them in trucks, carting and stacking materials including coils in the store compound. It was claimed that as the respondent had failed to execute work, the

same was got done at the risk and cost of the respondent. Therefore, the respondent was responsible for making payment of heavy wharfage and demurrage charges paid by the appellant. It was further contended that the respondent had failed to complete with work within specified time and, therefore, the work of carting had to be got carried out even before March 31, 1968 for the material received upto March 31, 1968. It was claimed that the appellant had paid wharfage and demurrage charges to the tune of Rs.4621.30 ps for the period from December 24, 1968 to March 21, 1968. It was claimed that the appellant had paid total amount of Rs.26901.80 os as wharfage charges upto March 28, 1968 and, thus, the appellant had paid total amount of Rs.31, 523.10 ps on account of wharfage and demurrage charges. It was alleged that the respondent was duty bound to pay the said amount to the appellant. It was further averred that, as the respondent had left the work of unloading and lifting, the appellant had to engage crane from the Oil, Natural & Gas Commission for unloading steel coils, as a result of which, it had to pay crane charges of Rs.2394.17 ps. It is further alleged that there was short delivery of 29 bags of cement and there was also short delivery of steel to the tune of 7.39 M.Tons and, thus, the appellant was entitled to recover from the respondent an amount of Rs.7019.60 ps being value of short delivery of quantity of cement and steel. It was further alleged that the respondent had failed to return two tarpaulins and, therefore, the appellant was entitled to recovery Rs.305.60 ps being value of two tarpaulins. In short, the appellant made counter claim of Rs.60,191.92 ps to be recovered from the respondent.

4. The respondent, by his application Exh.22, had deleted original defendant No.2. The said request was granted by the Court by its order dated July 22, 1975 below application Exh.22, and the original defendant No.2 came to be deleted from the record of the Civil Suit No.672 of 1972.

5. On rival contentions raised by the parties, the City Civil Court raised issues at Exh.21. To prove the case, the respondent examined Rasiklal Kasturchand Shah at Exh.55. During the course of his deposition, he produced original contract at Exh.69. The witness, during his deposition, also produced relevant correspondence which had taken place between the respondent and the appellant. On behalf of the appellant, Deputy Engineer, Jayantilal Chunilal Shah, who was attached to the Capital Project Division No.15 at Pathapur, at the relevant time, was examined at Exh.266.

The Executive Engineer, Pranlal Someshwar Pandya, who was working in Division No.4, Capital Project, Ahmedabad, in the year 1968, was examined at Exh.294. The appellant also produced documentary evidence, to which reference shall be made as and when necessary during the course of this judgment.

6. The Trial Court, on appreciation of oral as well as documentary evidence, concluded that the respondent had proved that he had unloaded 2346 MT of iron coils of the appellant from Randheja Railway Station and delivered it to Pathapur PW Stores. The Trial Court concluded that the respondent was entitled to carting charges at the rate of Rs.16 per MT of the extra item of lifting of iron coil. The Trial Court did not allow the claim of the plaintiff of carting charges at the rate of Rs.20 per MT. The Trial Court further concluded that the appellant had failed to prove that the respondent had committed breach of contract as alleged in the written statement. The Trial court partly allowed counter claim of the appellant in the sum of Rs.5201.30 ps. In the ultimate analysis, the Trial Court had passed a decree in favour of the respondent for a sum of Rs.45,502.40ps with interest at the rate of 6% per annum from the date of the suit till realisation. The appellant has challenged the said decree passed by the Trial court in favour of the respondent and not allowing the counter claim in the sum of Rs.39,075/92 ps, by filing this appeal.

7. Learned Assistant Government Pleader, Mr. K.G. Sheth, has taken me through the entire record and proceedings of the trial court and submitted that the respondent was liable to lift iron coils as per the terms and conditions of the suit agreement and he cannot claim carting charges of iron coils as extra items. The learned Assistant Government Pleader further submitted that the trial court had failed to appreciate relevant terms and conditions of the suit agreement and erred in not holding that the respondent had committed breach of contract by not lifting iron coils and steel bars from Randheja Railway Station. Learned counsel for the appellant further submitted that the respondent had left the contract incomplete and the appellant had to engage other agency and had to incur wharfage and demurrage charges which were paid on behalf of the respondent. It is submitted that the trial court ought to have allowed counter claim lodged by the appellant for the loss which had been incurred for non-performance of the contract on the part of the respondent as per the terms and conditions of the suit agreement. Learned counsel for the appellant further submitted that the trial court has

also erred in not properly appreciating that there was short supply of cement and steel bars for which the respondent was duty bound to pay price of the said items to the appellant.

8. Learned counsel, Mr. K.G. Sukhwani, appearing for the respondent, has submitted that the respondent had lifted iron coils which items was not included in the suit agreement Exh.69. Learned counsel for the respondent submitted that the trial court had properly appreciated oral as well as documentary evidence and had rightly concluded that lifting of steel bars to the tune of 2342 MT being extra items, the respondent was entitled to claim carting charges for lifting of iron coils at the rate of Rs.16 per MT. Learned counsel for the respondent further submitted that the witnesses examined by the appellant did not clarify whether iron coils were tender items. Learned counsel for the respondent further submitted that tender item M.S. bars did not include iron coils. Therefore, it was separate and distinct item not covered by the suit agreement. Learned counsel for the respondent further submitted that from the very inception, when coils were received, the respondent had immediately written a letter on March 18, 1968, Exh.60, wherein, it was specifically stated that large quantity of wagons of coils was being received and no rates were invited in the tender for such coils and coils were weighing very heavy and required to be lifted by cranes. Learned counsel for the respondent further submitted that the respondent had produced sufficient evidence to show that he had paid Rs.20 per MT to labourers and for crane charges for lifting of iron coils from the railway wagons. Learned counsel for the respondent further submitted that wharfage and demurrage charges claimed by the appellant were not sustainable in law, because, as per the suit contract, the respondent was only liable to lift approximately 3000 MT of MS bars, whereas, in fact, the respondent had lifted 2941 MT of MS bars and 2342 MT of iron coils within stipulated period. Learned counsel for the respondent, in this connection, submitted that wharfage and demurrage charges, as demanded by the appellant, were in respect of coils received after march 31, 1968 which was beyond period of time prescribed of one year under the suit agreement. Learned counsel for the respondent further submitted that the appellant had not produced any reliable documentary evidence in support of claim of shortage of 7.49 MT of Steel of value of Rs.6741/- and no proof was produced in respect of the claim and, therefore, the trial court was justified in rejecting the said claim of shortage of 7.49 MT of steel. Learned counsel for the respondent submitted, at the end,

that, even though witnesses were examined by the appellant, no oral or documentary evidence was produced in support of counter claim raised by the appellant and the counter claim, which was partly allowed by the trial court against the respondent, was on the basis of admission made by him (respondent). Therefore, the appeal deserves to be dismissed.

9. It is an admitted fact that the respondent had entered into agreement to lift 3000 MT of MS bars and the work of lifting was started on April 1, 1967 and it was to be completed within one year, i.e. on or before March 31, 1968. The evidence produced by the respondent clearly proved that it had lifted 2941 MT of MS bars and 2342 MT of iron coils from the railway wagons before March 21, 1968. The respondent had proved, by oral as well as documentary evidence, that lifting of iron coils from railway wagon was not included in the terms and conditions of the suit agreement. The trial court had, therefore, rightly held that lifting of iron coils from railway wagons was extra items. The respondent had proved that MS bars would be lifted with the help of manual labour, whereas, for lifting of iron coils, cranes were required and, by hiring cranes, the respondent had incurred more expenses and had to engage more labourers. The respondent, in his oral evidence, had stated that he was paying Rs.5 per MT for unloading coil from the wagon and Rs.4 per MT for reloading the same in the truck. He further deposed that he was paying Rs.4.50 per MT for unloading from the truck and taking coils to the PW Store. He deposed that total expense of unloading of iron coil and loading them in PW Store was Rs.18 to Rs.18.50 per MT. Therefore, in my opinion, the trial court was justified in awarding carting charges of lifting of iron coils at the rate of Rs.16/- per MT. The respondent had proved beyond the shadow of doubt that lifting of iron coil was not included in the suit agreement and suit agreement included MS steel bars only. Thus, lifting of iron coils was an extra item and was not covered under the suit agreement. Admittedly, the respondent had led sufficient evidence, oral as well as documentary, that he had lifted 2342 MT of iron coils from railway wagons and stored them in PW Store at Pethapur. As soon as wagons of iron coils had arrived at the railway station, the respondent had raised objection for lifting iron coils before the officers of the appellant and the officers of the appellant had agreed to pay to the respondent extra charges for lifting of iron coils from the railway wagons. It was not at the belated stage that the respondent was raising claim for extra charges of lifting iron coils, but, on the contrary, from

January 1968, the respondent had raised this claim of demanding carting charges of iron coils as extra item. The documentary evidence in the nature of correspondence produced by the respondent proved that, because of hiring more labourers and vehicles to lift iron coils from railway wagons, he had incurred heavy financial loss. The respondent had also requested the authorities to clear his bills as early as possible to ease his financial burden, which he had incurred for lifting iron coils from railway wagons. Letter dated April 19,1969 Exh.286 also indicates that unloading and carting of iron coils was not included in the specification of the tender. The letter further states that the work of removal of iron coils from the railway yard would only be done by ONGC cranes and the Department had to pay about Rs.16 per MT for 10 mm dia of iron coils and Rs.15 per MT for 6 mm dia of iron coils. In view of this letter, the trial court was justified in fixing the carting charges for removal of iron coils at the rate of Rs.16 per MT.

10. With regard to counter claim, the appellant had not led any evidence that it had incurred loss for non-payment of wharfage and demurrage charges by the respondent for not lifting the goods from the railway yard. The respondent was only liable to lift 3000 MT of MS steel bars. The evidence produced on record indicates that, in fact, the respondent had lifted 2941 MT of MS bars and 2342 MT of iron coils before March 31, 1968. From the evidence, it emerged that, daily, 15 wagons were arriving at the railway yard loaded with iron coils which was an extra item not included in the suit contract. The respondent was not liable to lift those iron coils and it was beyond his capacity to lift such a huge quantity of iron coils. The suit agreement had confined only to lift steel bars. Even though lifting of iron coils was extra item, the respondent had lifted 2342 MT of iron coils. The trial court had rightly held that the respondent was not liable to pay demurrage and wharfage charges for iron coils which were loaded at railway yard of Randheja Railway Station. In absence of any cogent and reliable evidence to substantiate claim of payment of wharfage and demurrage charges, because of not lifting of goods by the respondent, the trial court was justified in rejecting the said counter claim. With regard to shortage of 7.5 MT of steel, no proof, whatsoever, was produced by the appellant at the trial of the suit. On the contrary, the witness examined by the appellant Exh.266 had admitted that, "it is true that I have not calculated shortage of steel". The trial court was justified in concluding that, in respect of shortage of steel, nothing was produced on record and no demand was raised by the

appellant before the final bill. In short, no evidence was produced by the appellant with regard to loss of 7.49 MT of steel during subsistence of the suit agreement. The respondent had admitted that the counter claim raised by the appellant in the sum of Rs.5205.30 ps which amount was deducted by the trial court from the amount of decretal dues of Rs.45,502.40 ps. In absence of any evidence, the trial court was justified in rejecting the counter claim of the remaining amount raised by the appellant. The findings recorded and conclusions arrived at by the trial court are based on sound principle of law and proper appreciation of oral as well as documentary evidence and I find no reason to interfere with the same.

11. As a result of foregoing discussion, the appeal is dismissed with no order as to costs.

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(swamy)